

IDAHO DEPARTMENT OF WATER RESOURCES

IBLA 76-546

Decided October 26, 1976

Appeal from decision of Idaho State Office, Bureau of Land Management rejecting in part application I-9976 for temporary withdrawal of lands for proposed development under the Carey Act.

Affirmed in part; remanded in part.

1. Act of August 18, 1894 (Carey Act) -- Act of March 15, 1910 --
State Selections -- Withdrawals and Reservations: Generally --
Withdrawals and Reservations: Reclamation Withdrawals --
Withdrawals and Reservations: Temporary Withdrawals

Applications filed by the State of Idaho under the Act of March 15, 1910, for temporary withdrawals of land for proposed development under the Carey Act of 1894, must be rejected where the lands have been previously withdrawn for reclamation purposes.

2. Act of August 18, 1894 (Carey Act) -- Act of March 15, 1910 --
Regulations: Force and Effect as Law -- Withdrawals and
Reservations: Generally -- Withdrawals and Reservations:
Temporary Withdrawals

In the absence of pertinent statutory directives or regulatory criteria for the processing of temporary withdrawal applications for unreserved lands filed by a state under the Act of March 15, 1910, for proposed development under the Carey Act, the Bureau of Land Management should suspend consideration of the applications pending Departmental action to revise and

recodify previously deleted regulations which provide guidance for the administration of the Carey Act and the Act of March 15, 1910.

APPEARANCES: Nathan W. Higer, Legal Counsel, Idaho Department of Water Resources, Boise, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

The Idaho Department of Water Resources appeals from a decision of the Idaho State Office, Bureau of Land Management, dated March 1, 1976, rejecting in part State application I-9976 filed pursuant to the Act of March 15, 1910, 43 U.S.C. § 643 (1970), for the temporary withdrawal of some 3,044.08 acres of land for proposed development by the "Gines Project," under the Carey Act of 1894, as amended, 43 U.S.C. § 641 et seq. (1970). The basis for the rejection was that the land included in the application, except for 80 acres, had been withdrawn under the Bureau of Reclamation's withdrawal for its Mountain Home Project.

In its statement of reasons, the State argues that under the Carey Act it can select any desert lands owned by the United States and that if it requests that land owned by the United States be withdrawn, the United States must set aside those lands for entry under the Carey Act. It is the State's belief that only lands not owned by the United States are exempt from operation of the Carey Act. Appellant claims that its right to the lands vested in 1894 at the time the grant was made, subject only to the requirements of settlement. Appellant argues that under the Carey Act Congress has entered into a contract with the State to deed to it up to 3 million acres of land and there is no provision in the Act authorizing the Secretary to withdraw desert lands from settlement.

Appellant's argument that the State's right to segregate and withdraw land under the Carey Act vested at the time of the passage of the Act and takes precedence over subsequent withdrawals is incorrect. Appellant's argument assumes that the Carey Act grant was a grant in praesenti and that it is mandatory under the Act for the Secretary to withdraw lands on request by a qualified state. The statute, however, is couched in discretionary language, authorizing and empowering, but not requiring, the Secretary to contract and agree with the states to donate, grant, and patent lands. Idaho Department of Water Resources, 21 IBLA 210, 214, 215 (1975); State of Wyoming, 36 L.D. 399 (1908).

[1] The Act merely authorizes the Secretary to contract in the future with various states to grant them a maximum quantity of desert lands upon the fulfillment of certain conditions. Idaho Department of Water Resources, supra at 215. Thus the State does not have an unrestricted right to cause settlement under the Carey Act of lands owned by the United States, and the State's application for lands must be rejected when the lands requested have been previously withdrawn for other purposes. Idaho Department of Water Resources, 25 IBLA 27, 31 (1976).

[2] Regarding the 80 acres of unreserved land, the State Office noted that because of the unlikelihood that a Carey Act project would be considered for approval on that amount of acreage, the State should consider withdrawing the entire project proposal for the present. Regulations pertaining to the Carey Act and those pertaining to temporary withdrawals under the Act of March 15, 1910, were deleted from Title 43 of the Code of Federal Regulations in 1970. 35 F.R. 3072 (1970). We hold that in the absence of a request by the State to withdraw its temporary withdrawal application, further action on the application shall be temporarily suspended pending the recodification of regulations providing guidance for administration of the Carey Act and the Act of March 15, 1910. Idaho Department of Water Resources, 25 IBLA 27, 32-33 (1976); Idaho Department of Water Resources, 24 IBLA 314, 319 (1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is affirmed to the extent of rejection of the application for lands heretofore withdrawn, and set aside and remanded for further action as to unreserved lands consistent with the views expressed herein.

Douglas E. Henriques
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Joan B. Thompson
Administrative Judge

